

1-1-1989

## What Does the Fairness Doctrine Controversy Really Mean

Jerome A. Barron

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_comm\\_ent\\_law\\_journal](https://repository.uchastings.edu/hastings_comm_ent_law_journal)

 Part of the [Communications Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Jerome A. Barron, *What Does the Fairness Doctrine Controversy Really Mean*, 12 HASTINGS COMM. & ENT. L.J. 205 (1989).  
Available at: [https://repository.uchastings.edu/hastings\\_comm\\_ent\\_law\\_journal/vol12/iss2/3](https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol12/iss2/3)

This Commentary is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

# What Does the Fairness Doctrine Controversy Really Mean?

by  
JEROME A. BARRON\*

## Introduction

The short-run question in the controversy over the Fairness Doctrine<sup>1</sup> is whether Congress will someday restore the Doctrine. The next question is, if Congress does restore the Doctrine, will President Bush veto it? If President Bush does not veto it, the Fairness Doctrine still faces other perils in order to survive. A constitutional challenge will surely ensue.

The first part of this Commentary explores the irony that neither the FCC nor the United States Court of Appeals for the District of Columbia Circuit has displayed any eagerness to face the ultimate constitutional question: Does the Fairness Doctrine violate the first amendment? As we shall see, the Court of Appeals managed to uphold the FCC abolition order without holding the Fairness Doctrine unconstitutional in any fundamental sense, and without precluding Congress from resurrecting the doctrine. The Court of Appeals provided a judicial benediction for the demise of the Fairness Doctrine. In the long run, it leaves the door open for revival of the Fairness Doctrine by Congress.<sup>2</sup> But the Fairness Doctrine controversy has a meaning for the first amendment and the future of broadcast regulation that transcends the immediate outcome of the various battles to come: whether fairness will be restored to broadcasting.

This larger, transcendent meaning of the Fairness Doctrine controversy is the focus of this Commentary. In 1987, the Federal Communications Commission (FCC), emboldened by the unanticipated developments chronicled below, abolished the Fairness Doctrine altogether. Abolition was based to a large extent on the theory that the refer-

---

\* Lyle T. Alverson Professor of Law, George Washington University National Law Center.

I wish to thank Dean Jack Friedenthal for making available a National Law Center summer research grant to me. I also wish to thank Karen Kingen for her assistance in the preparation of this article; and Henry Geller who generously shared his insights—gained over a life time of distinguished service in broadcast regulation—with me.

1. See *infra* note 11 and accompanying text.

2. See *infra* Part IB.

ence to the Fairness Doctrine in the 1959 amendment to section 315 of the Federal Communications Act of 1934 did not codify the Doctrine.<sup>3</sup> This amendment, it was successfully argued, acknowledged the public interest standard that permeates the entire Federal Communications Act.<sup>4</sup>

The second part of this Commentary contends that a bedrock fairness principle inheres in the public interest standard. It is my position,

3. Federal Communications Act of 1934, 47 U.S.C. § 315 (1989), states the following:

**CANDIDATES FOR PUBLIC OFFICE; FACILITIES; RULES**

a. Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

1. bona fide newscast,
  2. bona fide news interview,
  3. bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary),
- or
4. on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

b. Broadcast media rates

The charges made for use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—

1. during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
2. at any other time, the charges made for comparable use of such station by other users thereof.

c. Definitions

For purposes of this section—

1. the term "broadcasting station" includes a community antenna television system; and
2. the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

d. Rules and regulations

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

4. *See infra* text accompanying note 98.

and that of others who seek to restore the Fairness Doctrine, that the public interest standard itself has a minimalist definition that includes fairness. This core meaning of the public interest standard is built into the Federal Communications Act and the structure of American broadcasting.

The abolition of fairness is intended to privatize American broadcasting and to make the broadcast media fungible with the print media. This can only really be accomplished if licensing is also abolished.<sup>5</sup> If licensing is not abolished—and it is a rare broadcaster who argues that it should be—then broadcasters must remain public trustees operating in the public interest. The public interest standard, which these trustees are licensed to observe, contains a fairness component that cannot be thrown off. In *Red Lion Broadcasting Co. Inc. v. FCC*,<sup>6</sup> Justice White set forth the “‘public interest’ in broadcasting” as an *independent* ground for “the presentation of vigorous debate of controversial issues of public importance and concern to the public.”<sup>7</sup>

In short, the Fairness Doctrine controversy is basically a challenge to the responsibilities that the licensing process inevitably imposes and it should be understood as such. The war on the Fairness Doctrine is really a war against the idea of the broadcast licensee as a public trustee operating in the public interest. It is a battle to insist on licensing without taking responsibility for it. It is—when the first amendment smoke screen is removed—a battle to get something for nothing.

For at least twenty years, since the 1969 *Red Lion* decision, the life of the Fairness Doctrine has been precarious.<sup>8</sup> *Red Lion*, which validated the Doctrine on first amendment grounds,<sup>9</sup> is the source of enduring controversy despite its unanimity. *Red Lion* represents a positive role for government in the opinion process; it suggests not only that such a role is consistent with the first amendment, but that it requires imple-

---

5. Licensing means that broadcasters, before the commencement of the license period, have received government permission to operate, and that broadcasters, after the expiration of the license period, must ask a government agency for permission to continue. The newspaper press does not have to ask for such permission either to begin or to continue. Barriers to entry and to continuation are conditioned on the market. Since broadcast licensees are almost always renewed even against competing applicants, broadcasters depend on government to keep out their competition. Since no government net of licensing envelopes and shields the newspaper press, it is not surprising that more is asked of broadcasters in the way of public service obligation than of newspaper publishers. Thus, in *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983), the court, although generally approving FCC deregulation of radio, nevertheless declared that there was a “bedrock obligation” on the part of broadcast licensees “to cover public issues.”

6. 395 U.S. 367 (1969).

7. *Id.* at 385.

8. See *infra* note 15 and accompanying text.

9. *Red Lion*, 395 U.S. at 396.

mentation of the first amendment.<sup>10</sup> Resistance to the constitutional ideas expressed in that decision has since continued unabated.

A quick look at the language of the Doctrine may evoke surprise that so much controversy has been occasioned by it. Chief Justice Burger summarized the Doctrine for the Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,<sup>11</sup> "formulated under the Commission's power to issue regulations consistent with the 'public interest,' the [Fairness] Doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints."

The current debate over the Fairness Doctrine is the latest chapter in a continuing struggle over the meaning of the first amendment in the context of the broadcast media. The intensity of the current struggle is reflected in the fact that FCC abolition of the Fairness Doctrine on August 4, 1987, brought to a head the battle between Congress and the FCC.<sup>12</sup>

Whether the Fairness Doctrine will be revived is unclear. Congress has been trying to enact a new fairness statute since the FCC abolition order.<sup>13</sup> If a new federal statute does revive the Fairness Doctrine, then such a statute will undoubtedly be challenged in the courts as invalid under the first amendment. If a new federal statute is not enacted, then the nature of the argument will shift. It will be argued that fairness still exists as a statutory obligation under the Federal Communications Act of 1934 by virtue of the public interest standard and the public trusteeship concept.

Whether the new battle over fairness proceeds along statutory or constitutional lines, it will raise fundamental issues about the nature of broadcast regulation and about the meaning of the first amendment. This Commentary will discuss the significance of some of these issues.

In the next stage of the struggle over the Fairness Doctrine, decisions of the FCC and the Court of Appeals, which together have managed to abolish the Fairness Doctrine, will have considerable importance. These decisions and their implications for the first amendment climate

---

10. *Id.* at 394-96. "Believing that the specific application of the Fairness Doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional . . . ." *Id.* at 375.

11. 412 U.S. 94, 110-11 (1973).

12. See *Syracuse Peace Council v. Television Station WTVH*, Memorandum Opinion and Order, 2 F.C.C. Rcd. 5043, 5057 (1987), *recon. denied*, 3 F.C.C. Rcd. 2035 (1988).

13. S. 742, 100th Cong., 1st Sess. (1987); H.R. 1934, 100th Cong., 1st Sess. (1987); S. REP. NO. 34, 100th Cong., 1st Sess. (1987); H.R. REP. NO. 108, 100th Cong., 1st Sess. (1987).

with regard to broadcast regulation create issues that will have considerable importance in the future. These issues will be addressed first.

## I

### FCC Abolition of the Fairness Doctrine—Background

Section 315 played a key role in the Fairness Doctrine controversy. This amendment exempted certain broadcasts from generating "equal opportunities" obligations from the broadcast licensee. In the course of setting down these exemptions in section 315(a), Congress included the following disclaimer language:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed on them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.<sup>14</sup>

This disclaimer language has ever since been relied on by fairness proponents to support the contention that Congress "codified" the Fairness Doctrine in section 315. Fairness adversaries contend with equal force that the statutory language quoted above only acknowledges the authority of the FCC to administratively establish a Fairness Doctrine under the public interest standard.

Trouble for the Fairness Doctrine arrived with the political success of the adversaries of government regulation—the election of Ronald Reagan to the presidency and the appointment of Mark Fowler as FCC Chairman in 1981. Trouble also came in the form of significant defections of former supporters of the Fairness Doctrine.<sup>15</sup>

---

14. 47 U.S.C. § 315(a) (1989).

15. For example, an influential defection was that of Judge David Bazelon of the United States Court of Appeals for the District of Columbia who was once a stalwart defender of the Fairness Doctrine. In two cases, *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972) and *National Citizens Comm'n for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977) [hereinafter *NCCB*], *aff'd in part and rev'd in part*, 436 U.S. 775 (1978), Judge Bazelon expressed grave doubts about the Doctrine. In his dissent in *Brandywine-Main Line Radio*, Judge Bazelon expressed the view that the Fairness Doctrine might impact too adversely on the small, under-funded radio station. 473 F.2d at 64. In *NCCB*, he declared that Watergate had changed his thinking about the Fairness Doctrine and that he now thought the Fairness Doctrine might be too susceptible to political manipulation. 555 F.2d at 954. Interestingly, the Watergate tapes, which provoked these concerns, involved the licensing process and not the Fairness Doctrine. The licensing process, of course, still endures.

See also F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* (1975). Friendly's thoughtful concerns about broadcast regulation and the Fairness Doctrine, although fundamentally supportive, were symptomatic of a decline in enthusiasm for the Fairness Doctrine. *Id.* at 32-42. Friendly did not call for the abolition of the Doctrine. He asked instead that the Doctrine

The first amendment climate changed after *Red Lion*. The success of the print media in warding off a right of reply<sup>16</sup> gave new impetus to those who always believed that broadcasting should be under the same first amendment regime as the print media.

The seventies were a decade of considerable ambivalence about whether, in a first amendment sense, the media or the public should have the dominant stake in broadcasting.<sup>17</sup> In the eighties, there was less willingness to see the first amendment as protecting competing speakers—the public and the broadcast journalist. A narrower, less catholic conception of first amendment rights was in the air. Policies which accorded specific legal rights to the public were suddenly vulnerable.<sup>18</sup> The Fairness Doctrine was particularly targeted for demolition by the ascendant deregulatory philosophy.

#### A. Paving the Way to Abolishing the Fairness Doctrine

The first real blow to the security of the Fairness Doctrine did not come from the FCC but from a Supreme Court decision, *FCC v. League of Women Voters of California*.<sup>19</sup> The case did not directly concern the Fairness Doctrine but in fact reaffirmed it. In *League of Women Voters*, the Supreme Court held that a provision of the Public Broadcasting Act of 1967,<sup>20</sup> which forbade editorializing by noncommercial educational broadcasters receiving funds from the Corporation for Public Broadcasting, violated the first amendment.<sup>21</sup>

Although Justice Brennan, who wrote the opinion, said the Court still adhered to the public trusteeship concept of broadcast regulation based on the scarcity rationale,<sup>22</sup> he noted that the rationale had increas-

---

be narrowed. Like Henry Geller, he urged that fairness be considered only at renewal time. *Id.* at 229.

16. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258-59 (1974). *Tornillo* had rejected claims of public rights to the print media. This gave new impetus to the claim that there should be no public rights to the electronic media either. See generally L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 248-56 (1987).

17. Compare, for example, *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), where the broadcaster's first amendment rights were emphasized over a claim of public first amendment access rights, with *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), where the public's first amendment interest in diversity prevailed over claims that the FCC's cross-ownership policies violated rights of newspaper owners and broadcasters.

18. The political, editorial and personal attack rules came under scrutiny in 1983. See Notice of Proposed Rulemaking, 48 Fed. Reg. 28295, 28298, 28301 (June 21, 1983). Fairness came under scrutiny one year later. *Inquiry Into the General Fairness Doctrine Obligations of Broadcast Licensees*, 49 Fed. Reg. 20317 (1984).

19. 468 U.S. 364 (1984).

20. 47 U.S.C. §§ 390-99 (1967).

21. 468 U.S. at 376-81.

22. *Id.* at 376.

ingly come under attack.<sup>23</sup> Justice Brennan stated the Court would nonetheless not reconsider its longstanding approach to broadcast regulation without a signal from either the FCC or the Congress on whether "technological advances" now required some "revision of the system of broadcast regulation."<sup>24</sup> In *League of Women Voters*, Justice Brennan thus shook the ground under both the scarcity rationale and the Fairness Doctrine. He noted that if the FCC could show that the consequence of the Fairness Doctrine was to reduce rather than enhance speech, then the Court would have to reconsider the constitutional basis of *Red Lion*.<sup>25</sup>

The 1985 *Fairness Report*<sup>26</sup> was the FCC response to the Supreme Court request for a "signal" in the *League of Women Voters* case.<sup>27</sup> In a separate statement, FCC Chairman Mark Fowler characterized the 1985 *Fairness Report*: "Today's Report is an indictment of a misguided government policy. It is a recital of its shortcomings, both legal and practical."<sup>28</sup>

In the 1985 *Fairness Report*, the FCC posited that it could not repeal the Fairness Doctrine because it was codified by the 1959 amendment to section 315.<sup>29</sup> The FCC also declared that it had no authority to make a determination on the first amendment validity of the Fairness Doctrine.<sup>30</sup> Thus, the 1985 *Fairness Report* did not abolish the Fairness Doctrine. That was not its purpose. Its purpose was to shake the Doctrine to its foundations by undertaking a major assault on the factual predicates upon which the Doctrine rested. If these factual predicates were no longer sound, then constitutional reconsideration of the Doctrine would, hopefully, become necessary. Accordingly, the 1985 *Fairness Report* made two findings that would be vital to any first amendment reconsideration of the Doctrine.<sup>31</sup> First, fairness chilled expression.<sup>32</sup> Second, the

---

23. *Id.* at 376 n.11.

24. *Id.* Justice Brennan also observed in this footnote that "[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite technology, communities now have access to such a wide a variety of stations that the scarcity doctrine is obsolete." See, e.g., Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982).

25. 468 U.S. at 378-79 n.12.

26. *In re General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985) [hereinafter 1985 *Fairness Report*].

27. 468 U.S. at 376 n.11.

28. 1985 *Fairness Report*, 102 F.C.C.2d at 252.

29. *Id.* at 148.

30. *Id.* at 155.

31. *Id.* at 152-53.

32. In the 1985 *Fairness Report*, the FCC concluded that the Fairness Doctrine chills speech. See *id.* at 147-48. The FCC said on the basis of this finding alone "we no longer believe that the Fairness Doctrine, as a matter of policy furthers the public interest and we have substantial doubts that the Fairness Doctrine comports with the strictures of the first amendment." *Id.* A principal basis for the finding was the testimony of broadcast journalists,



increase in the number of radio and television outlets in the years since *Red Lion* removed the need for the Fairness Doctrine.<sup>33</sup>

The 1985 *Fairness Report* revealed the FCC's true feelings about the Fairness Doctrine, but it did not itself occasion destruction of the Doctrine. The vehicle the FCC used to do so developed out of an enforcement proceeding, *Syracuse Peace Council v. Television Station WTVH*.<sup>34</sup> The Syracuse Peace Council filed a complaint against the Meredith Corporation, licensor of television station WTVH in Syracuse, New York, for violating the Fairness Doctrine. Surprisingly, the FCC enforced the Fairness Doctrine initially.<sup>35</sup> The FCC agreed with the complainant, Syracuse Peace Council, that the station failed to give viewers alternative perspectives on whether a nuclear power plant was a desirable investment for New York.<sup>36</sup>

The Meredith Corporation petitioned the FCC for reconsideration of the decision on the ground that the Fairness Doctrine violated the first amendment.<sup>37</sup> The FCC denied Meredith's petition for reconsideration.<sup>38</sup> Nothing in the petition, according to the FCC, persuaded it to change its finding that WTVH had violated the Fairness Doctrine.<sup>39</sup> In declining to declare the Doctrine unconstitutional, the FCC relied on its refusal to rule on the first amendment issue in the 1985 *Fairness Report*.<sup>40</sup>

---

such as Dan Rather of CBS News, that "the very existence of the Fairness Doctrine creates a climate of timidity and fear, unexperienced by print journalists, that is antithetical to journalistic freedom." *Id.* at 171. Citizen groups challenged these findings on the ground that this testimony was self-serving and that it related to the opinion of journalists about the impact of the Fairness Doctrine on programming practices rather than to specific incidents. *Id.* at 180. The FCC rejected these objections on the ground that broadcast journalists were in the best position to assess whether or not the Fairness Doctrine actually inhibited the presentation of controversial issues of public importance. *Id.* at 181.

The FCC analysis of the chilling effect issue is exclusively focused on the impact of the doctrine on the broadcaster. No inquiry is directed to the issue of whether the existence of the Fairness Doctrine encourages members of the public to insist on the balanced presentation of controversial issues. In short, chilling effect as a first amendment principle is approached as if only the broadcaster may invoke it. The chilling effect on individual members of the public from loss of the Fairness Doctrine is simply not considered by the FCC, despite the admonition in *Red Lion* that "it is the right of the viewers and listeners, not the right of the broadcasters which is paramount." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

33. Judge Williams, in *Syracuse Peace Council v. FCC*, 867 F.2d 654, 660 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3427 (U.S. Jan. 9, 1990) (No. 89-312), said these were the two "core" findings of the 1985 *Fairness Report*.

34. 99 F.C.C.2d 1389 (1984).

35. *Id.* at 1393-94.

36. *Id.* at 1401.

37. *Syracuse Peace Council v. Television Station WTVH*, 59 Rad. Reg.2d (P & F) 179 (1985).

38. *Id.* at 185.

39. Nonetheless, the FCC said no remedy was called for because WTVH had granted Syracuse Peace Council air time during the summer of 1984. *Id.* at 184-85.

40. *Id.* at 182 n.4.

Again, the FCC said that the appropriate forum for such action was either Congress or the courts.<sup>41</sup>

Meredith then sought review in the United States Court of Appeals for the District of Columbia Circuit.<sup>42</sup> On the basis of the first part of Judge Silberman's decision for the court of appeals in *Meredith*, one might have thought that the court was eager to reach the constitutional issue. Judge Silberman went out of his way to put aside standing and non-constitutional grounds for disposing of the case.<sup>43</sup> But it turned out that the court of appeals did not want to rule on whether the Fairness Doctrine was in violation of the first amendment; the court wanted the FCC to do it.<sup>44</sup>

Both the FCC and the court of appeals that decided *Meredith* wanted the Fairness Doctrine declared violative of the first amendment. But neither wanted to take the initiative. Judge Silberman's decision in *Meredith* remanded the case to the FCC so that it could consider Meredith's claim that the Fairness Doctrine is unconstitutional.<sup>45</sup>

Sending the first amendment "hot potato" back to the FCC was not easy; there were serious legal hurdles to overcome. For one thing, Judge Silberman had to escape from the long-established administrative law doctrine that federal administrative agencies cannot declare federal legislation unconstitutional.<sup>46</sup> The theory of *Meredith* is that the FCC established the Fairness Doctrine as an administrative policy in the course of

---

41. *Id.*

42. *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987).

43. *Id.* at 869-70. Arguably, Meredith prevailed on reconsideration before the FCC. The FCC ruled that Meredith acted in good faith in giving Syracuse Peace Council air time during the summer of 1984. *Id.* at 868. There was, therefore, a substantial question whether Meredith had standing to challenge the FCC's original determination that Meredith violated the Fairness Doctrine. What was being enforced against Meredith as a result of the FCC's denial of Meredith's petition for reconsideration? No remedy was enforced against WTVH in the case. Was there any injury? Nevertheless, the court of appeals found standing to exist: "The FCC's holding is inherently coercive in the sense that it is binding on Meredith; it is an implication as to future conduct and could be used against the licensee in a renewal hearing." 809 F.2d at 869.

Similarly, Meredith contended that there was no "controversial" issue of public importance involved. *Id.* at 870-71. Meredith argued that when it aired the advertisement for the plant in the summer of 1982 "the economic soundness of the Nine Mile II plant had ceased to be controversial because the New York State Public Service Commission had already approved the plant." *Id.* at 871. Had the court of appeals in *Meredith* decided the case on a non-controversial issue basis this would also have made it unnecessary for the court of appeals to rule on the first amendment question. *Id.* at 870. Nevertheless, the court of appeals decided it would not dispute the FCC's finding that the nuclear plant issue was controversial. *Id.* at 871.

44. *Id.* at 872.

45. *Id.* at 874.

46. Judge Silberman conceded the problem, presented by the doctrine set forth in *Johnson v. Robison*, 415 U.S. 361, 368 (1974), "that regulatory agencies are not free to declare an act of Congress unconstitutional." 809 F.2d at 872. But he said the Fairness Doctrine was an ad-

its continuous interpretation of the public interest.<sup>47</sup> Just as the FCC could create the Fairness Doctrine under its power to interpret the public interest standard, so too could it abolish the Doctrine on that power.

Yet, as Judge Silberman saw it, the FCC was afraid simply to say this and to abolish the Doctrine. Why? If the FCC abolished fairness on the ground that it was just an administrative doctrine, when Congress believed fairness was a statutory obligation, the FCC would have to reckon with the anger of Congress.<sup>48</sup>

Judge Silberman's opinion tried to make it difficult for the FCC to avoid resolving the first amendment issue. In his view, the FCC could not avoid passing on the constitutional issue just because it would irritate Congress to do so.<sup>49</sup> The FCC's only alternative to ruling on the first

---

ministrative and not a statutory creation and, therefore, the doctrine of *Johnson v. Robison* did not apply. *Id.*

47. The authority Judge Silberman relied on for this conclusion was the decision of another District of Columbia Circuit panel, *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) [hereinafter *TRAC I*], *petition for reh'g en banc denied*, *Telecommunications Research and Action Center v. FCC*, 806 F.2d 1115 (D.C. Cir. 1986) [hereinafter *TRAC II*]. *TRAC I* held, in Judge Silberman's words, "that the Fairness Doctrine is not mandated by statute." 809 F.2d at 873 n.11 (emphasis in original).

48. In Judge Silberman's view, the FCC had already indicated that it believed that the Fairness Doctrine was not statutorily created or mandated in its 1985 *Fairness Report*. *Id.* at 872. This conclusion flowed from doubt expressed by the FCC about the Fairness Doctrine's constitutionality in the 1985 *Fairness Report*: "[o]f course, the fair inference to be drawn from the Commission's report was that the Commission believed the doctrine was not specifically mandated; otherwise, it would have been irresponsible for the Commission gratuitously to cast constitutional doubt on a Congressional command." *Id.*

49. *Id.* at 872-73. For the FCC to rule on the constitutionality of the Fairness Doctrine would mean that the FCC believed fairness to be an administrative creation rather than a statutory obligation. But the FCC could not refuse to rule on the first amendment validity of fairness simply because that would have implied that fairness was not statutorily compelled and Congress would be displeased. *Id.* The FCC could not refuse to rule on the first amendment issue just because it would be "politically awkward." *Id.* at 874. But, as Judge Silberman pointed out, the FCC worked hard to popularize its view that the Fairness Doctrine was not codified. Judge Silberman stated in *Meredith* that the FCC had "largely undermined the legitimacy of its own rule." *Id.* at 873. This was, if anything, an understatement.

What is remarkable is that the FCC strategy to undermine the Fairness Doctrine was used in *Meredith* to create an exception to the doctrine that an agency cannot challenge the constitutionality of its own statute. See *id.* at 874 n.13. Judge Silberman describes the FCC campaign to undermine the Fairness Doctrine's legitimacy as follows:

The FCC has issued a formal report that eviscerates the rationale for its existing regulations. The agency has deliberately cast grave legal doubts on the fairness doctrine and has done so in such a formal fashion that it contends—in our companion case, *RTNDA*—its Report creates jurisdiction for this court to review the legality of the doctrine itself.

*Id.* at 873.

The *RTNDA* case to which Judge Silberman refers is *Radio-Television News Directors Ass'n v. FCC*, 809 F.2d 860 (D.C. Cir. 1987), *vacated*, 831 F.2d 1148 (D.C. Cir. 1987). In *RTNDA*, a court of appeals panel was asked to rule that "in light of the Commission's finding [in the 1985 *Fairness Report*] that the Fairness Doctrine has a chilling effect on the first amend-

amendment issue in an enforcement proceeding was to find that the Fairness Doctrine violated the public interest standard.

Judge Silberman characterized the *Meredith* case as an enforcement case.<sup>50</sup> But what was being enforced? In its denial of this petition for reconsideration, the court did not impose any form of redress on the Meredith Corporation. Judge Silberman detected only one possible adverse effect on the broadcaster: that the initial determination that Meredith had violated the Fairness Doctrine might be a demerit against it when Meredith applied for a license renewal.<sup>51</sup> Because the FCC's hostility to the Fairness Doctrine was, if anything, greater than Meredith's, it certainly strains credulity to believe that the FCC would not renew Meredith's license on such a basis. This is particularly so when the FCC went out of its way to praise Meredith's good faith for giving air time to the Syracuse Peace Council in the summer of 1984.<sup>52</sup>

In essence, the whole scenario was reminiscent of an Agatha Christie murder mystery—the Fairness Doctrine taking the place of the corpse. Many parties had a reason for wanting the victim out of the way, but no one wanted to do the awful deed.

#### B. The FCC Abolishes the Fairness Doctrine

In the aftermath of *Meredith*, the FCC was at last presented with the scenario it wanted. The *Meredith* court remanded the case to the FCC to consider Meredith's constitutional arguments.<sup>53</sup> Prior to the FCC's decision, the federal court of appeals in *TRAC I* held that the Fairness Doctrine was not statutory law but merely an administrative creation.<sup>54</sup> Therefore, the Fairness Doctrine could be repealed by the FCC. Congressional action was not necessary. Mark Fowler's dream of burying the Fairness Doctrine had become at this juncture almost a judi-

---

ment activities of broadcasters, it is important that the court now consider the constitutionality of the Fairness Doctrine." 809 F.2d at 862. The court quickly ducked this opportunity to pass on the first amendment validity of the Fairness Doctrine and ruled in the three-page opinion that the 1985 *Fairness Report* did not constitute "agency action" subject to judicial review. *Id.*

Interestingly enough, in the *RTNDA* case, the FCC agreed with the broadcasters seeking review that the 1985 *Fairness Report* was "an appropriate vehicle" for reviewing the Fairness Doctrine. *Id.* Why did the FCC take this position in *RTNDA*? Because then the court would have borne the onus of declaring the Fairness Doctrine unconstitutional rather than the FCC. Why did the court not do this in *RTNDA*? One reason might be that an intermediate appellate court would then have been the first to rule on the first amendment invalidity of the Fairness Doctrine, *contra Red Lion* and Congress. Political awkwardness appears to be in the eyes of the beholder.

50. 809 F.2d 863, 872-73 (D.C. Cir. 1987).

51. *Id.* at 869.

52. *Id.* at 868.

53. *Id.* at 874.

54. See *TRAC I*, 801 F.2d 501.

cial directive. No one, of course, was in suspense as to the FCC's conclusion. Judge Silberman was not in suspense either, having observed in *Meredith* that the 1985 *Fairness Report* "would appear to foreshadow its conclusion as to the constitutionality of the enforcement proceeding against Meredith."<sup>55</sup>

On August 4, 1987, the FCC abolished the Fairness Doctrine as predicted; it concluded in *Syracuse Peace Council* that "the Fairness Doctrine contravenes the first amendment and thereby disserves the public interest."<sup>56</sup> The FCC based its conclusion on the following grounds:<sup>57</sup> (1) the Fairness Doctrine chills speech; (2) the Fairness Doctrine is not narrowly tailored to achieve a substantial governmental interest; (3) dramatic changes in the electronic marketplace provide a basis for Supreme Court reconsideration of the diminished protection provided to the electronic media;<sup>58</sup> and (4) because societal roles of print and electronic media are identical, the same first amendment principles should be applied to each.<sup>59</sup> These issues are still the key to determining the first amendment validity of the Fairness Doctrine.

When the FCC declared the Fairness Doctrine invalid in *Syracuse Peace Council*, numerous parties quickly sought review in the United States Court of Appeals for the District of Columbia Circuit. Many public interest groups urged reversal.<sup>60</sup> The networks and *Meredith* intervened in the proceeding to urge affirmance, as did the FCC. In *Meredith*, the FCC expanded the proceeding, inviting comments on whether, in light of the 1985 *Fairness Report*, the Fairness Doctrine was constitutional and whether its enforcement was in the public interest.<sup>61</sup> As a result, there was widespread participation in the proceeding by friends and foes of the Fairness Doctrine. *Meredith* brought together communications law luminaries who supported opposing views on the Fairness Doctrine issue.<sup>62</sup>

---

55. 809 F.2d at 872.

56. 2 F.C.C. Rcd. 5043, 5057 (1987).

57. *Id.* at 5048-58.

58. The FCC in *Syracuse Peace Council* relied heavily on *FCC v. League of Women Voters*, 468 U.S. 364 (1984), concluding: "We further believe, as the Supreme Court indicated in *FCC v. League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished first amendment protection to the electronic media." 2 F.C.C. Rcd. at 5058.

59. *Syracuse Peace Council*, 867 F.2d at 657.

60. These included the Democratic National Committee, Common Cause, National Council of Churches, and United Church of Christ.

61. 809 F.2d at 872.

62. Floyd Abrams, Henry Geller, Andrew Schwartzman, and Timothy Dyk, among others, participated in the debate.

On petition for review on February 10, 1989, the District of Columbia Circuit Court of Appeals upheld "the FCC's decision that the Fairness Doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion."<sup>63</sup> The court affirmed the FCC decision without reaching the constitutional issues in *Syracuse Peace Council* and denied the petition for review.<sup>64</sup> The Fairness Doctrine, which had been advocated earlier by such illustrious members of the District of Columbia Circuit as Judges Bazelon, Burger, Wright, and Tamm, was no longer favored in the very circuit which had long sustained it.

The affirmance by the court of appeals in *Syracuse Peace Council* of the FCC decision abolishing the Fairness Doctrine was surprising for what it did not say. The court panel was no more anxious to resolve the question of the first amendment validity of the Fairness Doctrine than Judge Silberman had been in *Meredith*. The opinion for the panel was written by Judge Stephen Williams. Judge Kenneth Starr wrote a concurring opinion, and Judge Patricia Wald concurred in part and dissented in part.<sup>65</sup>

Judge Williams began his opinion conventionally, stating that the Fairness Doctrine had neither constitutional nor statutory status.<sup>66</sup> He made it clear, however, that he had to surmount a barrier to an easy affirmance of the FCC's scuttling of the doctrine in *Syracuse Peace Council*. The problem was that the FCC had "slightly complicated the issue . . . by asserting that the policy and constitutional considerations are inextricably intertwined."<sup>67</sup>

Judge Williams insisted that the policy, public interest, and constitutional considerations in *Syracuse Peace Council* were separable; the abolition of the Fairness Doctrine could be predicated on the public interest standard alone.<sup>68</sup> This position had a certain quixotic flavor because the

---

63. *Syracuse Peace Council*, 867 F.2d at 669 (D.C. Cir. 1989).

64. *Id.*

65. Judge Wald's dissent, in part, addressed the point that the FCC in *Syracuse Peace Council* had no authority to invalidate the first prong of the Fairness Doctrine. Judge Wald described the first prong of the Fairness Doctrine as "requiring broadcasters to provide coverage of vitally important controversial issues of interest in the community served by the licensees." See *1985 Fairness Report*, 102 F.C.C.2d at 146. Judge Wald believed that "this aspect of the [FCC's] decision . . . [was] not supported by the record and was not adopted in compliance with the Administrative Procedure Act." *Syracuse Peace Council*, 867 F.2d at 669 (Wald, C.J., concurring in part and dissenting in part).

66. Judge Williams said that during the entire proceeding no one had suggested that the Fairness Doctrine was constitutionally compelled. Furthermore, since Judge Bork had spoken in *TRAC I*, no claim that the Fairness Doctrine was mandated by statute could be made. 867 F.2d at 657.

67. *Id.* (citing *Syracuse Peace Council v. Television Station WTVH*, Memorandum Opinion and Order, 2 F.C.C.Rcd. 5043, 5046 (1987)).

68. *Id.* at 659, 669.

FCC had specifically based its *Syracuse Peace Council* decision on the constitution.<sup>69</sup>

It would not have been unreasonable for the FCC to have been annoyed by Judge Williams' effort to deconstitutionalize the FCC's *Syracuse Peace Council* decision. The FCC had followed Judge Silberman's direction from *Meredith* and had considered the constitutional issue.<sup>70</sup> Now Judge Williams, for the other panel from the same court, seemed determined to obfuscate that effort.

In a valiant effort to deconstitutionalize the FCC order abolishing the Fairness Doctrine, the court of appeals panel emphasized the fact that the FCC had incorporated its 1985 *Fairness Report* by reference in its *Syracuse Peace Council* decision.<sup>71</sup> The 1985 *Fairness Report* specifically declined to rule on the constitutional issue because it believed that deciding the issue was a judicial rather than an agency prerogative.<sup>72</sup> In a separate concurrence in *Syracuse Peace Council*, Judge Starr said he was unable to accept the panel decision's labored attempt to ignore the constitutional rationale in the FCC decision to abolish the Fairness Doctrine.<sup>73</sup>

Judge Starr, unlike Judge Williams, seemed prepared to rule that the Fairness Doctrine was unconstitutional, but instead similarly tiptoed

---

69. *Syracuse Peace Council v. Television Station WTVH*, Memorandum Opinion and Order, 2 F.C.C. Rcd. 5043, 5058 (1987) ("Accordingly, we reconsider our prior determinations in this matter and conclude that the Constitution bars us from enforcing the Fairness Doctrine against station WTVH.").

70. While it is true that Judge Silberman gave the FCC the option on remand to dispose of the matter on the public interest standard, it was clear that he preferred disposition on the constitutional issue. *Meredith Corp.*, 809 F.2d at 874.

71. *Syracuse Peace Council*, 867 F.2d at 659. Judge Williams said that the 1985 *Fairness Report* had two core findings upon which the FCC relied heavily in *Syracuse Peace Council*: (1) that the Fairness Doctrine chilled rather than encouraged expression; and (2) significant increases in the number of broadcast outlets removed the need for the Fairness Doctrine. *Id.* at 660. The response to this might be that findings such as a chilling effect and the scarcity rationale relied on in the 1985 *Fairness Report* are, in fact, constitutional in nature.

72. To support his view that the Doctrine fails to serve the public interest, Judge Williams relied on two conclusions of the FCC order in *Syracuse Peace Council*: (1) that the Fairness Doctrine had a chilling effect; and (2) that it resulted in excessive government intrusion into editorial autonomy. *Id.* at 659 (citing *Syracuse Peace Council*, 2 F.C.C. Rcd. at 5052). However, as Judge Starr pointed out in his concurrence, the FCC had referred to these matters in an earlier portion of its order under a heading specifically entitled "Constitutional Considerations Under *Red Lion*." *Id.* at 675. This is just one of a number of examples in the order evidencing a focus on the constitutional issue.

73. Judge Starr describes how the constitutional rug was pulled out from under the parties in the case: "After elaborate briefing on the constitutional issue resolved by the Commission in conformity with the *Meredith* remand, my colleagues have arrived at the view—urged by no one in the case—that our analysis can properly proceed by, in effect, blue penciling the Commission's language purporting to base the agency's action on constitutional grounds." *Id.* at 673 (Starr, J. concurring). Judge Starr determined that the reason given by the majority for

around the first amendment issue, albeit in a more subtle fashion than Judge Williams, stating: "I would hold only that the FCC's decision to eliminate the Fairness Doctrine correctly interprets *Red Lion* and is based, as the Court's opinion effectively demonstrates, on an adequate factual record."<sup>74</sup>

Although Judge Starr upheld the FCC order, he took great pains to make it clear that there was no first amendment barrier to the enactment of a new statute by Congress. Indeed, the whole thrust of his concur-

---

avoiding the constitutional issue is the salutary principle that courts must avoid constitutional issues when non-constitutional grounds of decision are available. *Id.* at 674.

Two factors provide a more likely explanation for all the casuistry behind avoiding the constitutional issue in the panel decision. One was a desire not to challenge the *Red Lion* precedent; the other factor could have been a desire not to preclude efforts to reinstate the Fairness Doctrine by statute. Congress would be undercut by a judicial holding that the Fairness Doctrine violated the first amendment since this would run counter to congressional efforts to revive the Fairness Doctrine—efforts which had been undertaken in the aftermath of the FCC abolition order.

In Judge Starr's view, taking the unnecessary avoidance of constitutional issues principle at face value made little sense in this context. For one thing, the avoidance principle makes better sense when applied to statutes rather than agency-created policy. But even more fundamental was that there were no non-constitutional grounds in the FCC's Fairness Doctrine abolition order upon which to base affirmance: "the record in this case simply will not, fairly read, yield the conclusion that the agency has based the specific decision before us independently on non-constitutional grounds. . . . [I]n short, the constitutional justifications for the Commission's actions must, alas, be considered." *Id.* at 674.

Judge Williams had observed in his opinion for the panel, "Happily the Commission's opinion is not written in exclusively constitutional terms." *Id.* at 659. Judge Starr's concurrence effectively detonates this proposition.

74. *Id.* at 681. Judge Starr separated the factual bases of the FCC order from the constitutional principles used in the order and said that the court's evaluation of the FCC's factual determinations should be looked at from an administrative law rather than a constitutional perspective. This difference in perspective would affect the standard of review to be employed. Judge Starr used an administrative law standard of review: the arbitrary and capricious standard. This standard gives great deference to the agency determination: "In view of the FCC's obvious expertise, we would be unwise (and unfaithful to the APA) to disregard the Commission's ultimate conclusions of fact with respect to the Fairness Doctrine's chilling effect; its interference with broadcasters' editorial discretion; and the explosive growth of media outlets." *Id.* at 680.

Furthermore, Judge Starr suggested that if the panel in *Syracuse Peace Council* was rendering a constitutional law determination, then the doctrine of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), might be applicable. *Bose* calls for independent review by the appellate court of the actual malice finding in a *New York Times v. Sullivan*-type libel case based on the theory that a finding with first amendment significance which is based on factual determinations requires independent appellate review. The suggestion is that this *Bose*-based rationale could be extended to the Fairness Doctrine issue.

Judge Starr frees himself from the burden of this doctrine—after raising it—by qualifying his restatement of the *Bose* doctrine: "Of course, as we have just seen, the line of cases culminating in *Bose Corp.* indicates that factual findings underlying the *denial* of a first amendment challenge would be subject to independent review." *Id.* at 681 (emphasis in original). This qualification cannot be found stated *in haec verbis* in either the *Bose* case or in a recent application of *Bose*. See *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678 (1989).



rence is that Congress is free to enact a new statute. He emphasized that the court was reviewing agency findings, not statutory findings. Therefore, "it would be anomalous if judicial approval of agency factual findings were awarded the Olympian force of a 'true' constitutional decision."<sup>75</sup>

Judge Starr, unlike Judge Williams, believed that the FCC's order was predicated on constitutional considerations. But Judge Starr detached the factual bases of the FCC's order from the constitutional principles that they allegedly support with the same intensity that Judge Williams exhibited in trying to separate the public interest basis of the FCC order from its constitutional basis. Both exercises eliminated any potential first amendment roadblock to the enactment of a new fairness statute by Congress.

Although Judge Starr upheld the FCC's conclusion that the Fairness Doctrine is unconstitutional, his concurring opinion provides an even more explicit basis for the enactment of a federal fairness statute than does the panel decision:

In short, it is conceivable that detailed reconsideration by a future FCC or carefully considered Congressional findings . . . could persuade a future court that, notwithstanding the FCC's contrary findings vindicated by today's decision, some *in futuro* version of the Fairness Doctrine could be implemented consistent with first amendment strictures.<sup>76</sup>

Congress is thus encouraged to make specific findings to justify a new Fairness Doctrine statute. Specific congressional findings will give a federal fairness statute a better chance for surviving constitutional attack in the courts. This is particularly true when the scope of judicial review of the administrative action is the very limited arbitrary and capricious standard.

## II

### The Congressional Reaction

Congressional reaction to the February 1988 court of appeals panel decision in *Syracuse Peace Council* came on March 15, 1989, when the Senate Subcommittee on Communications held a hearing on the proposed Fairness in Broadcasting Act of 1989. In his opening comments on the proposed Fairness in Broadcasting Act of 1989, Senator Daniel K. Inouye (D-Haw.) said:

Today's hearing is on the Fairness in Broadcasting Act of 1989, a bill to reinstate the Fairness Doctrine . . . . This legislation is almost identical to S. 742, which was passed by both the Senate and the House

---

75. *Syracuse Peace Council*, 867 F.2d at 680.

76. *Id.* at 681 (citations omitted).

last Congress but vetoed by the President. The purpose of this hearing is to supplement the record with information on the effects of the elimination of the Fairness Doctrine by the FCC.<sup>77</sup>

The 1989 effort was not the first congressional response to the assault on the Fairness Doctrine. As an immediate consequence of the 1986 decision in *Telecommunications Research and Action Center v. FCC* ("TRAC I"),<sup>78</sup> Congress asked the FCC in the 1986 Appropriations Act to use funds appropriated to the FCC under the Act to "consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987."<sup>79</sup>

Judge Bork held that the Fairness Doctrine was not codified by the reference to it in the 1959 amendment to section 315 of the Communications Act.<sup>80</sup> Therefore, the FCC was, in his view, under no statutory duty to apply the Fairness Doctrine to teletext if in its understanding of the public interest such an application was not warranted.

The FCC undertook a hearing to inquire into Fairness Doctrine alternatives.<sup>81</sup> In the meantime, on April 21, 1987, the Senate passed S. 742 codifying the Fairness Doctrine and the House followed suit on June 3, 1987.<sup>82</sup> Congress expressed its support of the Fairness Doctrine by holding up passage of the entire \$600 billion appropriations bill by including the Fairness in Broadcasting Act of 1987 in the appropriations bill. Nonetheless, President Reagan vetoed the bill and Congress did not try to override the veto.<sup>83</sup>

In August 1987, the FCC abolished the Doctrine. In so doing, the FCC ignored the specific congressional directive in the 1986 Appropriations Act to provide Congress with a report on alternatives to the Fairness Doctrine.<sup>84</sup>

---

77. *Fairness in Broadcasting Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989). See also *supra* note 13.

78. 801 F.2d 501 (D.C. Cir. 1986) [hereinafter *TRAC I*], *petition for reh'g en banc denied*, *Telecommunications Research and Action Center v. FCC*, 806 F.2d 1115 (D.C. Cir. 1986) [hereinafter *TRAC II*]. These cases are further discussed in the next section.

79. 132 CONG. REC. H10619 (daily ed. Oct. 15, 1986), *quoted in* *Meredith Corp. v. FCC*, 809 F.2d 863, 873 n.11 (D.C. Cir. 1987).

80. *TRAC I*, 801 F.2d at 517-18.

81. *Inquiry Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 F.C.C. Rcd. 1532 (1987).

82. See *supra* note 13 and accompanying text.

83. See Message to the Senate Returning S. 742 Without Approval, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987).

84. The FCC was a bit red-faced by its actions in this regard and tried to explain itself in a footnote in *Syracuse Peace Council*. The FCC said it was aware that former Chairman Fowler had told members of Congress that the FCC would not decide *Syracuse Peace Council* before it concluded the Fairness Doctrine alternatives report Congress had directed it to prepare:

In 1989 Congress once again attempted to revive the Fairness Doctrine and to codify it in unmistakable terms. Such efforts occurred both in the Senate<sup>85</sup> and in the House, where the House Energy and Commerce Committee added a Fairness Doctrine restoration provision to a budget reconciliation bill.<sup>86</sup> As in 1987, congressional emotions were running high. Congressman John Dingell (D-Mich.), Chairman of the House Energy and Commerce Committee, said that "no major communications legislation favorable to the broadcasting industry will move until fairness becomes law."<sup>87</sup> The strategy behind including the Fairness Doctrine restoration bill in the budget reconciliation bill was to "box in" President Bush, thereby preventing a presidential veto like that issued against the Fairness in Broadcasting Act in June 1987. Congress hoped that the revenue-raising features in the budget reconciliation bill would make President Bush reluctant to veto a fairness restoration bill.<sup>88</sup>

In summary, the recent history of the Fairness Doctrine, from the 1985 *Fairness Report*<sup>89</sup> when the FCC first made clear its wish to destroy the Doctrine, to the present, demonstrates a slow but inexorable push by the FCC to destroy the Doctrine. Some unanticipated developments in the United States Court of Appeals for the District of Columbia Circuit made this wish a possibility. Unexpected assistance from Judge Bork in *TRAC I*<sup>90</sup> and Judge Silberman in *Meredith*<sup>91</sup> removed statutory and doctrinal barriers to FCC abolition of the Doctrine.

---

[W]e have complied with that representation by today adopting and submitting the report requested by Congress. We have concluded in that report that it would not further the public interest to institute a rulemaking to consider the promulgation of agency rules on fairness doctrine alternatives. As a consequence, we do not believe that a suspension of this proceeding is warranted. . . . Furthermore, we note that the only issue before us in this proceeding is the continued viability of the Fairness Doctrine as it is currently administered. Consideration of this issue does not necessitate any additional evaluation of alternative policies.

*Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, 5061-62 n.60 (1987) (emphasis in original).

85. See *supra* note 13.

86. See Editorial, *BROADCASTING*, July 24, 1989, at 114.

87. See *Fairness Entangled in Budget Bill*, *BROADCASTING*, July 17, 1989, at 27.

88. *Broadcasting*, in an editorial, criticized the broadcast industry for its decision not to oppose recodification of the Fairness Doctrine, suggesting that this decision had been reached to obtain a *quid pro quo* from Congress on the must-carry rules. Editorial, *BROADCASTING*, July 10, 1989, at 74. See also *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (invalidating revised FCC must-carry rules on first amendment grounds). Under this scenario, the FCC would reinstitute must-carry rules for broadcasters and broadcasters, in turn, would agree not to oppose legislation to restore the Fairness Doctrine. *Broadcasting* protested the anomaly that broadcasters were less opposed to the Fairness Doctrine than the FCC. Editorial, *BROADCASTING*, July 10, 1989, at 74.

89. See *1985 Fairness Report*, 102 F.C.C.2d 143.

90. See *TRAC I*, 801 F.2d 501.

91. See *Meredith Corp.*, 809 F.2d at 863.

The deep-seated distaste for the Doctrine in the FCC and among many of the newly-appointed members of the United States Circuit Court of Appeals for the District of Columbia Circuit combined to at least temporarily destroy the Doctrine, even though the Fairness Doctrine was still strongly and bitterly defended in Congress.

Fundamental issues are at stake in this battle over the Fairness Doctrine: Is there a fairness principle which inheres in the public interest standard? Furthermore, is that principle a non-disposable component of the public interest standard? We proceed to answer these questions next.

### III

#### Fairness and the Public Interest Standard

The FCC abolition of the Fairness Doctrine was accomplished by rejecting the idea that the Fairness Doctrine was codified in the 1959 amendment to section 315 of the Communications Act of 1934. However, this rejection is based on a public interest standard rationale; the reference to fairness in section 315 is merely a congressional acknowledgement that the source for FCC creation of the Fairness Doctrine was in the public interest standard of the Communications Act.<sup>92</sup>

---

92. In his history of the Fairness Doctrine, Steven J. Simmons shows that some students of the Fairness Doctrine have long been of the opinion that the fairness principle is inherent in the public interest standard: "Former FCC Commissioner Houser has written that 'almost immediately' after the FCC was established 'it became apparent that inherent in the public interest standard was a requirement that the successful applicant provide fairness in the treatment of matters selected for broadcast,' and Professor [Roscoe L.] Barrow maintains that there was 'a substantial history of the Fairness Doctrine' even before 1941." S. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 31 (1978) (quoting Houser, *The Fairness Doctrine—An Historical Perspective*, 47 NOTRE DAME L. REV. 550, 553 (1972) and Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CHI. L. REV. 447, 462 (1968)).

Others, of course, have disagreed. S. SIMMONS, *supra*, at 31.

I note that Professor Simmons cites me as having said that "the Fairness Doctrine received its first tentative formulation by the Commission" in 1941. *Id.* (quoting Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 2 (1969)). This is, of course, a reference to the FCC's no-editorializing decision in *Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1941). However, the point is that even that recognition predated by eight years the FCC's formal announcement of a separate Fairness Doctrine in the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Until then, fairness was simply a principle or idea inherent in the public interest standard.

In further support of the idea that there is a bedrock fairness principle inherent in the public interest standard, Professor Simmons reported that his research showed that the second and most frequently enforced prong of the Fairness Doctrine—the obligation to provide balanced presentation of controversial ideas of public importance—long preceded the formal adoption of the Fairness Doctrine in 1949 by the FCC or its acknowledgement by Congress in the amendment to § 315: "My own review of FCC and court materials leads me to conclude that the affirmative part of the Fairness Doctrine, part one, did not surface until the 1940's.

The most recent judicial consideration of the relationship of the Fairness Doctrine to the public interest standard arose as a by-product of the controversy about whether section 315 codified fairness. In the 1985 *Fairness Report*,<sup>93</sup> the FCC made clear its view that the Fairness Doctrine was unnecessary and that it would prefer to abandon the Doctrine. But the FCC said at that time that it felt it could not repudiate its long-standing view that the Fairness Doctrine had been codified by statute in 1959. However, the FCC's wish to do away with the Doctrine was aided by an unexpected development.

Relief came from *Telecommunications Research and Action Center v. FCC* ("TRAC I").<sup>94</sup> The case presented the issue of whether a new technology, teletext, should be regulated like more traditional types of broadcasting. The FCC ruled that teletext was exempted from three forms of broadcast regulation: reasonable access for federal political candidates under section 312(a)(7), equal opportunities under section 315, and the Fairness Doctrine.

The FCC contended teletext should be governed by the *Tornillo* no regulation/editorial autonomy standard<sup>95</sup> rather than the *Red Lion* scarcity rationale standard because teletext resembled and was competitive with newspapers and magazines. In the print media arena, the FCC argued, there was no scarcity problem. Judge Bork, writing for the court of appeals panel in *TRAC I*, displayed great sympathy for this argument and expressed the hope that *Tornillo* would one day be pronounced applicable to both print and broadcast media. Nevertheless, Judge Bork rejected the FCC's first amendment attack.<sup>96</sup>

Although the FCC lost the theoretical constitutional issue in *TRAC I*, it basically won the war against the Fairness Doctrine. Judge Bork, joined by Judge Scalia, announced in *TRAC I* that the FCC had exempted teletext from the Fairness Doctrine because "Congress never actually codified the Commission's Fairness Doctrine, and that the Commission, therefore, had no obligation to extend its own policy to new services like teletext."<sup>97</sup> Two public interest groups, the Telecommunications Research and Action Center (TRAC) and the Media Access Pro-

---

However, part two, calling for program balance, does have roots in pre-1940 actions of the FCC." See S. SIMMONS, *supra*, at 31.

93. See 1985 *Fairness Report*, 102 F.C.C.2d 143.

94. 801 F.2d 501 (D.C. Cir. 1986).

95. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

96. "Teletext, whatever its similarities to print media, uses broadcast frequencies, and that, given *Red Lion*, would seem to be that." *TRAC I*, 801 F.2d at 509 (footnote omitted). The question of whether the scarcity rationale can still justify the Fairness Doctrine in particular, or broadcast regulation in general, is discussed in Part IV.

97. *Id.* at 516-17.

ject (MAP), disputed this contention on the ground that fairness was a statutory obligation codified in the 1959 amendment to section 315 of the Communications Act of 1934. But Judge Bork responded that the 1959 amendment merely "ratified the Commission's longstanding position that the public interest standard authorizes the Fairness Doctrine."<sup>98</sup>

It is not the purpose of this Commentary to examine legislative history as to whether the 1959 amendment did or did not codify the Fairness Doctrine. Instead, the purpose is to explore the possible effects acceptance of the *TRAC I* ratification theory will have on a fairness principle in the governance of the electronic media.

In *TRAC I*, Judge Bork said the FCC was within its authority to decline to apply fairness to teletext: "Because the Fairness Doctrine derives from the mandate to serve the public interest, the Commission is not bound to adhere to a view of the Fairness Doctrine that covers teletext."<sup>99</sup> In this view, an agency can change its mind about a policy if it believes that such a change serves the public interest. If an agency makes such an aboutface, however, it must justify the departure from prior policy. In *TRAC I*, the FCC had determined that applying the Fairness Doctrine would impede the growth of that new technology and the court ruled that this conclusion was rational.<sup>100</sup>

*TRAC I* exempted teletext from the Fairness Doctrine by characterizing the Doctrine as an administrative policy rather than a statutory mandate under section 315. Could the FCC abandon the Fairness Doctrine altogether on the ground that the Doctrine was just an administrative policy? Judge Bork's conclusion in *TRAC I*, that fairness inhered in the public interest standard, meant that the 1959 amendment to section 315 would not itself be a barrier to abandonment. But what about the argument that the statutory public interest standard was itself a barrier to abandonment of the Fairness Doctrine? The panel's decision in *TRAC I* does not grapple with this issue. It is rejected by implication because no limitation on the FCC's ability to change its conception of what the public interest requires is suggested.

TRAC and MAP asked for a rehearing en banc of the panel's decision in *TRAC I*. The court denied the request with a per curiam order.<sup>101</sup> Judge Abner Mikva, joined by Judge Harry Edwards, dissented from the denial of the rehearing en banc. In Judge Mikva's view, the

---

98. *Id.* at 517.

99. *Id.* at 518.

100. *Id.*

101. *TRAC II*, 806 F.2d at 1117.

majority's determination that the Fairness Doctrine was not a binding statutory obligation under section 315(a) was flatly wrong.<sup>102</sup>

Judge Bork, in a concurrence, supported the denial of a rehearing en banc in *TRAC II*.<sup>103</sup> For our purposes, the concurrence is significant because this time Bork was not content merely to say that the Fairness Doctrine was not codified in the 1959 amendment; instead he stated that it was not codified in the public interest standard either. He thus addressed the contention which no judge on the court, much less the FCC, had discussed—that fairness inhered in the public interest standard. Perhaps Judge Bork realized that the ultimate fairness codification issue centered around the public interest standard and that there was no point banishing fairness from section 315 if it was still part of the public interest standard.

---

102. *Id.* at 1116. Judge Mikva believed that there were two reasons why this holding was fundamentally wrong. First, he read the legislative history of the 1959 amendment as explicitly codifying the Fairness Doctrine. Second, he pointed to a number of prior decisions of the United States Court of Appeals for the District of Columbia Circuit which held that the 1959 amendment had codified the Fairness Doctrine.

Judge Mikva especially objected to Judge Bork's argument regarding codification: "In responding to the petition for review in this case, the commission never argued that the Fairness Doctrine was *not* statutorily mandated." *Id.* at 1118 (emphasis in original). Judge Bork in his panel decision for the court of appeals had simply reached out to decide the matter. For Judge Mikva, the law was clear: "[i]n the 1959 amendment the Commission is not simply authorized to impose the fairness doctrine, it is compelled to do so." *Id.*

Judge Starr, joined by Judge Robinson and Judge Ginsburg, also dissented from the denial of rehearing en banc on the ground that Judge Mikva's dissenting statement merited careful consideration. *Id.*

103. Judge Bork said that the dissent "appears to think the Fairness Doctrine was enacted for the first time in 1959." *Id.* at 1121. This, Judge Bork says, flies in the face of language in many Supreme Court cases dealing with the FCC's public interest authority. Judge Mikva really did not discuss the question of whether a fairness principle inhered in a statutory public interest standard which was common to both the Radio Act of 1927 and its successor, the Federal Communications Act of 1934.

Judge Mikva did not say, as Judge Bork claims he does, that Congress intended "to freeze by statute the Fairness Doctrine in the form it had in 1959." *Id.* Judge Mikva was referring to the Fairness Doctrine as a principle, not to particular ephemeral administrative applications of the Doctrine. Indeed, this has been the general approach to the Doctrine. Until *Syracuse Peace Council*, this was the approach of the FCC: the FCC was bound to follow the doctrine, but no particular application of the doctrine was forever frozen.

The pre-Mark Fowler FCC, other than an unsuccessful attempt by Chairman Richard Wiley to exempt radio from the Fairness Doctrine, was, in the main, too mindful of the Fairness Doctrine's public interest heritage and its own public interest enforcement obligations for total abandonment of the fairness principle to be a plausible policy. In the 1974 *Fairness Report*, for example, the FCC decided to repeal its post-1959 policy of applying the Fairness Doctrine to product advertisements. See *In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974). If Judge Bork's view of its § 315 codification position was correct, the FCC could not have undertaken its post-1959 extension of the Fairness Doctrine to product commercials or its repeal of that extension in 1974. What was intended to endure in the public interest standard and in § 315 was the fairness principle, not particular applications of that principle.

Judge Bork in *TRAC II* focused particularly on language in *Red Lion* where the Supreme Court construed the "disclaimer" that nothing in the 1959 amendment to section 315 relieved broadcasters of their Fairness Doctrine obligation. *Red Lion* determined:

This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the Fairness Doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.<sup>104</sup>

Judge Bork noted that this language can be read in one of two ways: either that (1) Congress enacted the Fairness Doctrine when it created the public interest standard in the Radio Act of 1927; or (2) the public interest concept found in the Radio Act of 1927 gave the Federal Radio Commission, the predecessor of the FCC, the power to create the Fairness Doctrine.<sup>105</sup>

It is interesting that even Judge Bork, hardly a Fairness Doctrine champion, concedes the possibility that a fairness requirement, which is a fundamental component of the public interest standard, may have been ordained by Congress. Nevertheless, Judge Bork implies that the second construction is the correct one. Under this construction, the FCC has the authority under the public interest standard to create a Fairness Doctrine but is not required to do so. The result of Judge Bork's analysis is that the Doctrine is not a statutory requirement under the public interest standard.<sup>106</sup>

By discussing the meaning of the public interest standard, Judge Bork anticipated a fundamental question, which was raised by fairness advocates in their petition for certiorari to the Supreme Court in the *Syracuse Peace Council* case.<sup>107</sup> The question is this: Even if fairness is not codified in the 1959 amendment to section 315, does the Doctrine still have statutory force through the public interest standard, which was es-

---

104. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) (footnote omitted).

105. *TRAC II*, 806 F.2d at 1119.

106. It should be noted that Judge Bork's view that fairness is not an enduring and essential component of the statutory public interest standard, espoused in his concurrence in support of the denial of a rehearing en banc in *TRAC II*, was not joined by any other member of the court.

107. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir 1989), cert. denied, 58 U.S.L.W. 3427 (U.S. Jan. 9, 1990) (No. 89-312). In its petition, *Syracuse Peace Council* asserts as one of the questions presented for review: "Whether the public interest standard in the Communications Act of 1934 requires that broadcast licensees act as public trustees to afford a reasonable opportunity for the discussion of conflicting views on issues of public importance." *Syracuse Peace Council*, Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Supreme Court of the United States, No. 89-312, August 23, 1989.



tablished, first, in the Radio Act of 1927 and, later, in the Federal Communications Act of 1934.

Judge Bork contends that Congress did not enact the Fairness Doctrine in the Radio Act of 1927. The Congress that wrote that Act, he argues, knew how to be sufficiently specific to write an "equal opportunities" rule for political candidates directly into law, yet, "[i]t wrote nothing that embodied a broader Fairness Doctrine."<sup>108</sup> He also observes that legislative proposals similar to the Fairness Doctrine were proposed and rejected by the Congress prior to the enactment of the Radio Act of 1927. Thus, Judge Bork concludes: "The foregoing demonstrates that the Fairness Doctrine was not enacted in 1927 and hence no such enactment could have been ratified in 1959."<sup>109</sup>

How persuasive is Judge Bork's conclusion in *TRAC II* that fairness was not enacted through the Radio Act of 1927? When he actually examines the legislative history of the Act, he does not focus on the reference to the "public interest" standard in the Radio Act of 1927, which is emphasized in the *Red Lion* quote he construes. Instead he asks whether a specific fairness concept was enacted in 1927. This is, of course, a rhetorical exercise because no one contends that it was.

Judge Bork does not specifically deal *at this juncture* with Justice White's observation in *Red Lion* that "the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues."<sup>110</sup>

By conceiving of the licensee as a public trustee, the FCC has enforced the public interest standard in broadcasting. By making broadcast licensees public trustees obligated to enforce the public interest standard, Congress created what Judge Skelly Wright once called the "unique hybrid of private sector ownership of the broadcast licensees tempered by public service responsibilities."<sup>111</sup> Judge Wright explained that licensees were made public trustees obliged to enforce the public interest standard

---

108. *TRAC II*, 806 F.2d at 1121.

109. *Id.* Henry Geller, long-time fairness advocate and one of the lawyers who drafted the petition for certiorari to the Supreme Court in *Syracuse Peace Council*, disputes this analysis. Telephone conversation with Henry Geller (Sept. 15, 1989). Geller views the legislative proposals rejected at the time of the Radio Act of 1927 as "equal opportunities" for public issues proposals. These proposals, because of their intrusiveness into broadcast journalism, were obviously unworkable and should be distinguished from a balanced presentation requirement for conflicting issues of public importance. Furthermore, Geller observes that Judge Bork's analysis really proves too much. Under the Bork view, no Fairness Doctrine could even have been developed by the FCC as administrative doctrine if Congress had specifically precluded recognition of such a requirement at the outset.

110. *Red Lion*, 395 U.S. at 380.

111. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1427 (D.C. Cir. 1983).

on a compensation theory: In return for "free and exclusive use of a limited part of the public domain," broadcasters were to be "burdened by enforceable public obligations."<sup>112</sup>

In *Syracuse Peace Council*, Judge Williams addressed—and dismissed—the contention that fairness inhered in the public interest standard: "Thus the claim of some parties that the Communications Act incorporates a public trustee concept that necessarily includes the Fairness Doctrine is in essence an effort to ask this panel to overturn *TRAC [I]*".<sup>113</sup> But in fact, *TRAC I* simply did not rule on whether the public trustee-public interest standard contained an indivisible fairness component.

In his separate statement concurring in the denial of rehearing en banc in *TRAC II*, Judge Bork tries to shut off this last supply of legal oxygen for the Fairness Doctrine:

The distinction between a statement that a policy is mandated and a statement that it is authorized is crucial, but it is a distinction the dissent systematically overlooks. There is every indication that Congress ratified the Commission's authority to evolve the Fairness Doctrine under the Act's public interest standard. But there is also every indication that Congress went no further. It did not legislate that, having created the Fairness Doctrine, the Commission was required to keep it and apply it as it stood in 1959.<sup>114</sup>

This passage reflects the point that because the 1959 amendment did not codify fairness, the FCC is free to decline to apply fairness to a new broadcast technology. But this did not mean that the FCC could dispense with fairness altogether as it did in *Syracuse Peace Council*.

Is there an enduring fairness principle which inheres in the statutory public interest standard which runs through the Federal Communication Act of 1934? Or does the public interest standard have no constant content whatsoever?

I believe that the public interest standard of the Federal Communications Act of 1934 does have a core meaning that includes a fairness obligation. In the short term, this may seem to be a matter of little consequence. The FCC is presently determined not to enforce a Fairness Doctrine. No matter how powerful the argument may be that fairness inheres in the public interest standard, the issue of the validity of that argument may seem to be of academic interest only. However, the matter has immediate implications. It is impossible to have the system of

---

112. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 997, 1003 (D.C. Cir. 1966).

113. *Syracuse Peace Council*, 867 F.2d 654, 657 n.1 (D.C. Cir. 1989).

114. *See TRAC II*, 806 F.2d at 1122.

licensing that we have in the United States and take the position that the broadcaster can operate in his private interest alone.

The whole theory of broadcast regulation and licensing operates on the basis of a distinction that Warren Burger made in *United Church of Christ* when he was still a judge on the United States Court of Appeals for the District of Columbia Circuit:

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.<sup>115</sup>

The idea that the public interest standard in broadcasting is a completely shifting standard, a standard which may be drained of any meaning at all at the pleasure of the FCC is, of course, completely inconsistent with Judge Burger's observations. This elastic conception of the public interest standard is implicit in Judge Bork's concurrence in *TRAC II*.<sup>116</sup>

Suppose that the FCC were to say that in its conception of the public interest, broadcasters should be able to operate entirely with the same latitude as the newspaper press? What issues would such a position raise? It is clear that in recent years the FCC has moved closer and closer to this position. Yet this position runs counter to the idea that a public interest standard has at least a minimal definition.

A minimalist definition of the public interest standard has in fact been recognized in recent years in absentminded moments even by Mark Fowler's FCC. When the massive FCC deregulation of commercial radio was reviewed in *United Church of Christ* by an appeals court panel,<sup>117</sup> Judge Wright, writing for the court, specifically insisted on a minimum content for the public interest standard. Moreover, he did so by relying on the FCC's similar understanding that the public interest standard had a core meaning. In the course of its deregulation of radio, the FCC "eliminated its quantitative processing guidelines for nonentertainment programming."<sup>118</sup> When various citizen groups challenged this abandonment, the court noted that in fact the FCC had not abandoned *all* "regulation of nonentertainment programming in favor of

---

115. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

116. "From the beginning, as the courts have repeatedly recognized [citations omitted], the Commission has been accorded broad and supple power to evolve rules and regulations to serve the 'public interest.' That flexibility is, and has been, the central feature of the Commission's authority." *TRAC II*, 806 F.2d at 1121.

117. *See Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

118. *Id.* at 1420.

total reliance on marketplace forces.”<sup>119</sup> The court noted that the FCC’s preference had been “to rely totally on the market and the decisions of individual licensees to set the amounts and type of nonentertainment programming.”<sup>120</sup>

Ultimately, the FCC decided against such complete deregulation and “explicitly reaffirm[ed] a public interest obligation for all radio licensees.”<sup>121</sup> Judge Wright then quoted the FCC’s conclusion in the *Radio Deregulation* proceeding that a “strict market approach” would not be feasible and “could be construed as contrary to the Act which mandates the licensing of individual stations.”<sup>122</sup>

Judge Wright quotes the FCC further to note that “each licensee has a bedrock obligation, historically rooted, to cover public issues.”<sup>123</sup> Judge Wright’s declaration in this connection was made in the context of the radio deregulation proceeding. Some broadcasters challenged the FCC’s decision to continue to oblige broadcast licensees to provide “issue responsive programming as part of the broadcaster’s public interest obligation.” Judge Wright rejected these objections: “However, over the years Congress, the Supreme Court, and the Commission have left no doubt that the regulatory scheme envisioned by the drafters of the Act impose upon licensees *some* affirmative obligation to present informational programming.”<sup>124</sup>

It is my contention that the FCC can no more entirely abandon a policy of requiring broadcasters to make a balanced presentation of controversial issues of public importance than it could entirely abandon the obligation to provide public issue programming in the *Radio Deregulation* proceeding. Justice White stated the matter simply in *Red Lion* when he said of the 1959 amendment to section 315: “In other words, the amendment vindicated the FCC’s general view that the Fairness Doctrine inhered in the public interest standard.”<sup>125</sup>

Now it is true—and this is the heart of Judge Bork’s separate concurrence in *TRAC II*—that Justice White also spoke in *Red Lion* of the “natural conclusion” that “the public interest language” of the Federal Communications Act “*authorized* the Commission to require licensees to use their stations for discussion of public issues and that the FCC is free to implement this requirement by reasonable rules and regulations

---

119. *Id.* at 1426.

120. *Id.*

121. *Id.* at 1427.

122. Report and Order on Radio Deregulation, 84 F.C.C.2d 968, 1071 (1981), *quoted in Office of Communication of United Church of Christ*, 707 F.2d at 1427.

123. *Id.*

124. *United Church of Christ*, 707 F.2d at 1429.

125. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969).

... ”<sup>126</sup> This language could be taken to support Judge Bork’s position: the FCC is authorized to create a Fairness Doctrine under the public interest standard, but that standard does not mandate retention of the Doctrine. However, an interesting refutation of the Bork “authorization is not requirement” view of whether fairness inheres in the public interest is found in a piece of legislative history that is quoted by Justice White in *Red Lion*. In 1930, Senator Dill declared that the Federal Radio Commission could issue regulations to require broadcast licensees “to afford an opportunity for presentation of the other side on ‘public questions.’ ”

Senator Dill. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions? Commissioner Robinson. Of course, I think in the legal concept the law requires it now. *I do not see that there is any need to legislate about it.* It will evolve one of these days. Somebody will go into court and say, “I am entitled to this opportunity,” and he will get it.<sup>127</sup>

This footnote in Justice White’s opinion accompanies a reference to the authority of the FCC to issue rules and regulations under the public interest standard of the Act.<sup>128</sup> The point of this colloquy is that fairness in the presentation of a public issues concept inheres in the public interest even without the issuance of regulations by the FCC.

Why do I recount this history of what previous courts, and the FCC itself, thought the public interest standard in broadcast regulation to mean? Certainly, it is not because I expect the FCC to issue a new fairness principle or doctrine any time in the near future. The purpose of this discussion is simply to underscore that the public interest standard has a certain minimal public issue obligation. This bedrock content of the public interest standard is what differentiates broadcasting from the print media.

If the public interest standard has this minimum content, then is such a standard constitutional? If Congress restores the Fairness Doctrine in a new and explicit statute, we can expect a first amendment challenge to that statute. But the first amendment issue that would be raised then is present now. A first amendment challenge to fairness is necessarily a challenge to the entire system of broadcast regulation. The basic question is the same: Why can broadcasters be charged with specific informational duties to the communities to which they are licensed when these same obligations cannot and could not be imposed on newspapers in those same communities? In *United Church of Christ*, Judge Wright

126. *Id.* at 382 (emphasis added).

127. See *Hearings before the Senate Comm. on Interstate Commerce on S.6, 71st Cong., 2d Sess. 1616 (1930), quoted in Red Lion*, 395 U.S. at 379 n.7. (emphasis added).

128. See 47 U.S.C. §§ 303, 303(r).

said that the "clear intent" of the Federal Communications Act was that the "award of a broadcasting license should be a 'public trust.'" <sup>129</sup> He relied here on Judge Burger's observation in the earlier *United Church of Christ* case that "broadcasters are temporary permittees or—fiduciaries—of a great public resource."<sup>130</sup>

Is the imposition of a public trustee obligation on broadcast licensees a violation of the first amendment? Broadcast licensees are bound by a public interest standard, albeit minimal, which has constant and enduring meaning. Is this public interest obligation a violation of the first amendment? These are the questions which a first amendment attack on the Fairness Doctrine inevitably raise. They are not avoided by saying that fairness was not codified in section 315. Neither are they avoided by saying that the FCC repealed fairness on the basis of a non-constitutional administrative policy determination in connection with the FCC's evolving conception of the public interest standard.

It is the thesis of this paper that a certain component of the public interest standard does not evolve but must remain constant. Fairness opponents confront a Hobson's choice. They escape the argument that fairness is codified in section 315 only by contending that section 315 merely ratifies a prior interpretation by the FCC of the public interest standard. This in turn requires an inquiry into the bedrock meaning of the public interest standard—a standard in which, as Justice White said, fairness inhered. Does it violate the first amendment to make broadcast licensees public trustees and to impose program service obligations on them? It is this question to which I next proceed.

#### IV

#### Scarcity and The First Amendment Rationale for Broadcast Regulation

This Commentary's special focus is on the struggle over the Fairness Doctrine. But fairness does not present a different first amendment question than other policies in broadcast law. These are also specific explications of the public interest and public trusteeship concept. Trusteeship and public interest are bound up not only with fairness but with concepts like equal time.<sup>131</sup> All rely on *Red Lion* for their first amendment validity. The "equal time" principle in fact has been challenged. Thus, in

---

129. 707 F.2d at 1427.

130. *Id.* at 1427 n.38 (quoting *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1989)).

131. *Red Lion*, 395 U.S. at 380-81. See also the text of the "equal time" rule, 47 U.S.C. § 315(a) (1989), set forth in note 3, *supra*.

*Branch v. FCC*,<sup>132</sup> a television reporter wished to run for the local town council; the station refused to allow him to continue working if he intended to pursue his candidacy. The reason? The station would have been required under the "equal-time" provision of section 315 "to provide thirty-three hours—or about one and a half broadcast days of response time"<sup>133</sup> to the reporter's opponents if he continued to work as a television newscaster and run for election at the same time. The reporter, William Branch, sought relief from both the FCC and the court of appeals, and both denied relief.

Branch contended that the "equal-time" or "equal opportunities" rule violated the first amendment. Judge Bork rejected this argument. He pointed out that when the Supreme Court declared the constitutional validity of the Fairness Doctrine in *Red Lion*, it also specifically upheld the equal time rule on the same basis: "[T]he [*Red Lion*] Court held that the statutory 'equal opportunities' rule in section 315 and the Commission's own Fairness Doctrine rested on the same constitutional basis of the government's power to regulate 'a scarce resource which the Government had denied others the right to use.'"<sup>134</sup>

Branch also argued that the equal opportunities rule was identical to the right of reply to the newspaper press law struck down in *Miami Herald Publishing Co. v. Tornillo*.<sup>135</sup> But Judge Bork held that the Court in *Red Lion* differentiated broadcasting noting, "What makes the broadcast medium unique, in the Court's view, is the scarcity of broadcast frequencies."<sup>136</sup>

Judge Bork concluded that *Red Lion* compelled the court to reject Branch's first amendment theory on this point. Furthermore, the court of appeals could not retreat from the *Red Lion* holding. The Supreme Court in *FCC v. League of Women Voters*—decided fifteen years after *Tornillo*—had only recently reaffirmed *Red Lion*.<sup>137</sup> It is true that the Court had asked for a "signal" as to whether technological change now called for some revision of the system of broadcasting, and it was also true that the FCC "may now" have provided such a signal in its 1985 *Fairness Report*. Nonetheless, the court of appeals was bound by *Red Lion*: "unless the [Supreme] Court itself were to overrule *Red Lion*, we remain bound by it."<sup>138</sup>

---

132. 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

133. *Id.* at 39.

134. *Id.* at 49 (citing *Red Lion*, 395 U.S. at 391).

135. 418 U.S. 241 (1974).

136. *Branch*, 824 F.2d at 49 (D.C. Cir. 1987) (citing *Red Lion*, 395 U.S. at 389-90).

137. *Id.* at 50.

138. *Id.*

Judge Bork was not always so deferential to the scarcity rationale of *Red Lion* as he was in *Branch*. A year before in *TRAC I*, he undertook a fundamental critique of the scarcity rationale:

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not in another.<sup>139</sup>

The flaw in this analysis is that it omits the role of government in the allocation of frequencies in the broadcast system. Government by its license allocation authority not only enables some to broadcast, it prevents others from broadcasting. Thus the power and value of the license is enhanced.

It is true that Judge Bork mentions the role of government in his opinion in connection with electronic interference. Government's role is to define "usable frequencies" and to protect "those frequencies from encroachment." Bork does not recognize a different role for government in broadcasting than the way in which government assists newspapers in delivering their product when it regulates the traffic and allocates rights of way. Neither does Bork recognize that cities do not have authority to prevent newspapers from publishing altogether. They do not allocate the use of the streets to one newspaper and deny it to others. Moreover, even if they did, the newspaper would conceivably still be able to function; but a broadcaster without a license cannot function at all.

While there are economic barriers to entry into the newspaper business, in broadcasting, the would-be new entrant has two barriers to overcome. First, the specific cost of entering the broadcast business, be it radio or television, acts as an economic barrier, and second, the would-be entrant must face the licensing hurdle.

The unique licensing role of government in broadcasting endows government with the status of ultimate gatekeeper. It is government, not the market economy, that decides who shall broadcast and who shall not. In *TRAC I*, after saying that the scarcity rationale cannot reconcile *Red Lion* and *Tornillo*, Judge Bork expressed the hope that one day the Supreme Court will revisit the distinction it has made between the systems of first amendment governance for the print and broadcast media—"surely by pronouncing *Tornillo* applicable to both . . . ."<sup>140</sup>

---

139. *TRAC I*, 801 F.2d at 508.

140. *Id.* at 509.



What would be the result of such a pronouncement? Broadcast media would be as free from government regulation as the newspaper press, but unlike the newspaper press, the broadcast media would have the assistance of a government licensing scheme to keep out competitors. *Tornillo* holds out to the print media the promise of a *laissez-faire* regime. But in broadcasting, a government licensing scheme distributes a public resource—the electromagnetic spectrum—to selected broadcasters. To promise a *laissez-faire* regime in such circumstances is to stand the present system of broadcasting on its head. If the 1985 *Fairness Report* or the FCC's Fairness Doctrine abolition order in *Syracuse Peace Council* had suggested that fairness should be abolished *and* that the present system of licensing should be abandoned, then the desire to extend *Tornillo* to the broadcast media would at least be part of a coherent theory. The objective would at least be clear—to separate government from broadcasting. But that is not the agenda that is offered either in the FCC's 1985 *Fairness Report* or in the order abolishing the Fairness Doctrine. Instead, the public service obligation of broadcasters was compared with the lack of such obligation on the part of the print media. The first amendment is to be used as a lever to remove the obligations now imposed on broadcasters. The remarkable feature of this position is that it is undertaken without any acknowledgment of, or apparent desire to change, the present status of broadcast licensees as—in Warren Burger's words—"permittees" or "fiduciaries."<sup>141</sup>

As we have seen from reading *Branch* and *TRAC I* together, Judge Bork believes the scarcity rationale cannot justify the present system of applying a different standard of first amendment governance to the broadcast media than to the print media:

One might attempt to resolve the tension between *Tornillo* and *Red Lion* on the ground that, while scarcity characterizes both print and broadcast media, the latter must be operating under conditions of greater "scarcity" than the former. This, however, is unpersuasive. There is nothing uniquely scarce about the broadcast spectrum. Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Company v. United States* (citation omitted). . . . Indeed, many markets have a far greater number of broadcasting stations than newspapers.<sup>142</sup>

In this passage, reference is made to the Supreme Court case that is the foundation stone of broadcast regulation, *National Broadcasting Co.*

---

141. *Office of Communication of the United Church of Christ v. FCC.*, 425 F.2d 543, 548 (D.C. Cir. 1969); cf. Dyk, *Full First Amendment Freedom for Broadcasters: The Industry as Eliza On the Ice and Congress as Overseer*, 5 YALE J. ON REG. 299 (1988), arguing that broadcasters should be granted permanent licensing and that there should be no content regulation.

142. *TRAC I*, 801 F.2d at 508-09 n.4.

v. *United States*.<sup>143</sup> However, there is nothing in Justice Frankfurter's opinion in *NBC* to suggest that an increase in the number of licensed broadcast outlets would fatally undermine the scarcity rationale as a basis for broadcast regulation. In upholding the FCC's chain broadcast regulations, Justice Frankfurter dealt with the contention of the networks that limiting the right of a network affiliate to sign up for the network programming for the entire broadcast day violates the first amendment. Justice Frankfurter rejected this argument as follows: "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."<sup>144</sup>

What Justice Frankfurter is talking about here is not that there are not "enough" broadcast outlets—whatever "enough" would be—but rather about the finite quality of the spectrum, and the various demands of government and society that it must satisfy. Every American cannot broadcast. One cannot have a workable system of broadcasting and give everyone a portion of the spectrum. Justice Frankfurter expanded on this at an earlier point in his opinion in *NBC*: "The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who wish to use them; the radio spectrum simply is not large enough to accommodate everybody."<sup>145</sup> Justice White made a similar point nearly a quarter of a century later when he charted the process by which the broadcast licensee became a public trustee in *Red Lion*: "Rather than confer frequency monopolies on a relatively small number of licensees in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week."<sup>146</sup>

In contrast, Judge Bork in *TRAC I* emphasized the significance of the rise in the number of broadcast outlets in the years since *Red Lion*.<sup>147</sup> This analysis is not accepted by all the players in the recent fairness litigation. Judge Starr in his concurring opinion in *Syracuse Peace Council* makes a distinction between allocational scarcity and numerical scar-

---

143. 319 U.S. 190 (1943).

144. *Id.* at 226.

145. *Id.* at 213.

146. *Red Lion*, 395 U.S. at 390.

147. *TRAC I*, 801 F.2d at 508-09.

city.<sup>148</sup> As he sees it, fairness proponents believe the Doctrine to be valid under the first amendment "so long as *allocational scarcity* exists."<sup>149</sup> On the other hand, he says, the FCC and other fairness opponents contend that the Doctrine is "depend[ent] on *numerical scarcity* in the sense that, without government intervention, the public is not provided with access to diverse viewpoints."<sup>150</sup>

Judge Starr says that he believes the FCC's position is more sound. Allocational scarcity can justify broadcast regulation generally. But "regulatory schemes" like the Fairness Doctrine which intrude "into first amendment territory" can only be justified by numerical scarcity.<sup>151</sup> This distinction is attractive to the broadcast industry. They can rely on allocational scarcity to protect the licensing system and their licenses since the incumbent is virtually always renewed. But they can be freed from regulatory obligations which displease them on the ground that only a numerical scarcity rationale can justify regulatory doctrines like fairness. Today, they argue—unlike the situation in *Red Lion*—numerical scarcity does not exist.

This distinction between allocational and numerical scarcity originated with Judge Starr and not Justice White. Not a suggestion of it can be found in *Red Lion*. Furthermore, allocational scarcity—in the sense that every American cannot practically be given a piece of the spectrum—was, as has already been shown, an integral part of the rationale of *Red Lion*. Indeed, an individualist perspective of the first amendment was at the heart of *Red Lion*. This is what Justice White meant when he said the first amendment right of the broadcaster is subordinate to the first amendment rights of the viewer and listener. The allocational-numerical scarcity distinction allows broadcasters to have it both ways. They keep their licenses and they are obliged to do nothing for them. The allocation-numerical scarcity distinction obscures the role of the broadcaster as public trustee.

Judge Starr said that "spectrum scarcity, without more" did not justify "regulatory schemes which intruded into first amendment territory."<sup>152</sup> What *more* was necessary? He answered this question by saying that the Supreme Court has upheld broadcast regulation when the "regulation furthered substantial first amendment interests . . ."<sup>153</sup> At this point Judge Starr gets into very deep water and, I believe, seriously

---

148. 867 F.2d 654, 682-83 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3427 (U.S. Jan. 9, 1990) (No. 89-312).

149. 867 F.2d at 682.

150. *Id.*

151. *Id.* at 683.

152. *Id.*

153. *Id.*

misreads *Red Lion*. His purpose in this discussion is to attack the reliance of Fairness Doctrine advocates on "the concept of allocational scarcity." His critique runs as follows: "[T]he central concern of *Red Lion* is that the Fairness Doctrine 'preserve an uninhibited marketplace of ideas.' [citation omitted] Indeed, a reading of *Red Lion* yields no evidence that the mere presence of excluded *broadcasters* is to be regarded as dispositive of the *public's* need for programming of a particular type."<sup>154</sup>

The significance of the allocational scarcity issue in *Red Lion* is not directed toward those within the excluded media, but it is directed to the excluded public. It never occurs to Judge Starr that an approach to first amendment interpretation might have as its focus the public rather than the media. Some later cases, such as *FCC v. National Citizens Committee for Broadcasting*,<sup>155</sup> *Columbia Broadcasting Systems v. FCC*,<sup>156</sup> and *Herbert v. Lando*,<sup>157</sup> emphasize the public or non-media dimension of first amendment protection. An exclusively media-oriented approach to the first amendment can, of course, also be easily found in post-*Red Lion* Supreme Court case law. The paradigm is certainly *Miami Herald Publishing Co. v. Tornillo*<sup>158</sup> but other examples can be found. Illustrative are Chief Justice Burger's observations in *Richmond Newspapers*<sup>159</sup> that the media act as the surrogate for the public and in *Nebraska Press*<sup>160</sup> that the media have a fiduciary duty to the public.

The key to understanding these observations, of course, is that the surrogate relationship or fiduciary relationship spoken of is intended to be non-enforceable in character. This is appropriate enough because *Nebraska Press* and *Richmond Newspapers* are print media cases. *Red Lion* is a broadcast media case. It does make an issue out of allocational scarcity in broadcasting and it does impose on broadcasters a fiduciary trusteeship which, unlike the situation with the print media, is intended to be enforceable.

In the scheme of things contemplated by the *Red Lion* Court, the broadcaster is the trustee for the public and the FCC holds the broadcaster accountable for his fiduciary obligation. Judge Starr takes the Court's language on that point and turns it on its head. Thus, he observes that the constitutionality of the Fairness Doctrine is "closely related to the incapacity of the *communications* marketplace to give

---

154. *Id.* (emphasis in original).

155. 436 U.S. 775 (1978).

156. 453 U.S. 367 (1981).

157. 441 U.S. 153 (1979).

158. 418 U.S. 241 (1974).

159. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

160. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976).

expression to diverse voices.”<sup>161</sup> Then he cites the much quoted line in *Red Lion* that it is the public’s right to receive “suitable access to social, political, esthetic, moral and other ideas . . . .”<sup>162</sup> This line of analysis argues that, because allocational scarcity at the time of *Red Lion* meant that some would-be broadcasters were excluded, a Fairness Doctrine was justified at that time because it led to the promotion of diverse voices. Nevertheless, the argument proceeds, if in the years since *Red Lion* the communications arena has provided additional voices to the point that there need no longer be any concern about the need for diverse voices, then the Fairness Doctrine cannot be justified under the first amendment. In other words, in a first amendment context, a diminution in numerical scarcity will cancel out the first amendment significance of allocational scarcity.

If the number of broadcasters has increased since *Red Lion* to the point that some optimal diversity of ideas quotient now characterizes the opinion process, is the proxy or trusteeship function of broadcast licenses no longer necessary? Can there be licensing without trusteeship? Is it constitutional to allocate a portion of the spectrum to a licensee with no obligation to air their own views? There are no answers to these questions in *Syracuse Peace Council* by either the FCC or the court. The implication is, however, that the FCC has concluded that the information process is sufficiently rich in outlets to allow the privatization of broadcasting. The FCC, Judge Starr implies, may so determine the issue until Congress says otherwise.

The FCC may repeal the Fairness Doctrine on the grounds that there are now far more electronic voices than was the case in *Red Lion*. But Congress may contradict this judgment by saying that even though there are now more voices, there is still not enough diversity. In my view, the FCC and the courts had no authority to abolish the Fairness Doctrine under existing law because of the public interest standard. The *Syracuse Peace Council* decision goes to considerable lengths to avoid the question whether a new fairness statute would violate the first amendment.<sup>163</sup> The decision and the FCC opinions which undergird it suggest that there may be very difficult first amendment questions raised by a statute mandating fairness. But the basic first amendment issue is present now.

Allocational scarcity is a reality with first amendment significance even if numerical scarcity is no longer a problem. It does not follow that because there are more outlets, allocational scarcity is no longer a prob-

---

161. *Syracuse Peace Council*, 867 F.2d 654, 683 (D.C. Cir. 1989) (emphasis added).

162. *Red Lion*, 395 U.S. at 390.

163. *Syracuse Peace Council*, 867 F.2d 654.

lem. The assumption here is that adding voices solves the right of the public to have access to ideas. This public right is not entirely satisfied by enlarging media representation. What troubled Justice White, writing for a unanimous Court in *Red Lion*, was that each member of the public cannot each have a piece of the spectrum. Indeed we have a trusteeship concept, a public interest concept, and a fairness concept because, as Justice White said, each of 200,000,000 Americans is not himself or herself given a piece of the spectrum as Congress could have chosen to do. The public were not directly given, as they could have been, the resource, the electromagnetic spectrum, which belongs to them. Broadcasters are licensed for a reason—to serve as “proxies” or “trustees” for the public they are licensed to serve.

## V

### **The Fairness Struggle and Its First Amendment Significance: Some Conclusions**

Suppose Congress enacts a new fairness statute, its first amendment validity is challenged, and the case which raised the issue reaches the Rehnquist Court? We can assume that the case would be the first amendment case of the century. But no new issues would be raised. Tension and conflict already exists in the Supreme Court's first amendment case law. This case law sometimes puts the public first in a case of conflict with the media, and sometimes does not. *Red Lion* espouses the position that particularly in broadcasting, government can legislate with respect to the opinion process because government is legislating concerning a resource which belongs to the public rather than private parties. *Red Lion* casts the first amendment in an uncommon role. The first amendment plays a positive role in the opinion process in broadcasting rather than the negative role it typically plays in the print media—keeping government out. Furthermore, in the law of broadcasting the individual is seen—at least in the case of ultimate first amendment conflict—as more important than the media or communicator.

Those who participated in the recent destruction of the Fairness Doctrine were well aware that the fairness issue has within it the ingredients for a new streamlined, monolithic view of the first amendment. Stripped of its present tensions, the first amendment will be seen simply as the guarantor of the media position when conflicts occur in the opinion process. Former Commissioner Nicholas Johnson has written: “The fight over the Fairness Doctrine is about nothing less than possession of the first amendment: Who gets to have, and express opinions in

America.”<sup>164</sup> This is an accurate statement of what is at stake. My own view, as a supporter of the Fairness Doctrine, is not that every broadcast quarrel between the broadcaster and the public should be resolved in favor of the individual or the public. Rather, no sector of society should be given ultimate and exclusive title to, or possession of, the first amendment.

Until recently, our law has been characterized by a helpful dialectic, particularly in the broadcast field. In 1969, *Red Lion* was a victory for the public and for the individual who believed that a broadcaster had been unfair. But *Columbia Broadcasting Systems v. Democratic National Committee*<sup>165</sup> in 1973 was a victory for the broadcast networks against political parties and citizen groups who sought access to them. In this case, the Court decided in favor of the broadcaster—no statute required the access the public interest groups sought. The Court justified its probroadcaster result by relying on the Fairness Doctrine and the public interest standard. These results led to the formation of subtle and conflicting currents in first amendment interpretation. Competing and contradictory consequences flow from a first amendment theory rich and generous enough to accord both the citizen and the media the right of free expression. This whole approach is predicated on the assumption that no one set of participants in the life of ideas should be anointed with a permanent first amendment halo. The issue in the present fairness controversy is altogether different. There is an implicit agenda in the mosaic of cases and administrative decisions that resulted in the abolition of the Fairness Doctrine. The agenda includes a number of objectives. First, the first amendment requires the privatization of broadcasting. Second, the broadcast media and the print media should be subject to identical first amendment standards. Third, the impact on the media, as the media perceive that impact, should be the sole measure of whether first amendment interests are upheld or infringed. Fourth, the first amendment should not be used to effectuate public rights in the opinion process. These objectives have nearly been accomplished in our current first amendment law.

What is at stake in the Fairness Doctrine controversy—and what will certainly come to the fore if the Fairness Doctrine is revived through a new statute—is nothing less than the future of an instrumental approach to first amendment problems. Judge Starr acknowledged this in *Syracuse Peace Council* when he referred to the Supreme Court case law that identified the instrumental role of Fairness Doctrine in particular,

---

164. Johnson, 'With Due Regard for the Opinion of Others': *The Fairness Doctrine Fight Is Over Nothing Less than Possession of the First Amendment*, 8 CAL. LAW., Aug. 1988, at 53.

165. 412 U.S. 94 (1973).

and broadcast regulation in general in effectuating first amendment goals.<sup>166</sup> These cases still constitute the first amendment perspective in broadcast regulation. Their future—painful as it may be to acknowledge for those, like myself, who share their inclusive and populist conception of the first amendment—is in doubt.

A new Fairness Doctrine statute could be invalidated on a number of grounds. These include the obsolescence of the scarcity rationale, the contention that the Fairness Doctrine has a chilling effect, or the idea that the broadcast media should be governed by the same first amendment norms that govern the print media. These arguments figured largely in the intricate litigation preceding the 1987 abolition of the Fairness Doctrine. I believe that the recent judicial and agency decisions, which rely on these arguments, are not dispositive of the validity of the fairness issue.

The scarcity rationale itself, as we have seen, turns out to be a two-edged sword. There is a weak link in any first amendment argument which uses the absence of scarcity against the continuation of old, or the development of new, broadcast regulatory policies. The weakness is that repeal is asked for all regulatory policies except the ultimate one—the licensing scheme.

Judge Starr attempted to escape this problem by arguing that acceptance of the scarcity rationale in *Red Lion* was contingent upon its relationship to other policies such as the furtherance of first amendment values, and the effectuation of the public's right of access to ideas.<sup>167</sup> Just so, licensing exists precisely to accomplish these objectives. However, the argument that the broadcast media and the print media should be subject to the same first amendment regime can only be seriously undertaken if one is willing to privatize broadcasting and dispense with licensing.

The *Syracuse Peace Council* decision makes reference to the ability of Congress to make findings, and implies that congressional findings on matters like chilling effect and scarcity will carry great weight.<sup>168</sup> The 1989 Fairness in Broadcasting Act is replete with findings on the continuation of scarcity in the broadcast media and on the need for additional diverse views in broadcasting. Yet, the extent to which congressional findings on the factual predicates supporting policies in the first amendment area will receive deference by the Supreme Court is an issue that is not altogether clear.

---

166. 867 F.2d at 677.

167. *Id.* at 683.

168. *Id.* at 654. See generally *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).



In *FCC v. National Citizens Committee for Broadcasting*,<sup>169</sup> for example, the cross-ownership rules were upheld by a unanimous Supreme Court against a first amendment challenge. It was said of the rules under attack in that case that they were justified, *inter alia*, on the ground that they rested on first amendment-based policies.<sup>170</sup> In *NCCB*, the policies were used to validate FCC rules rather than a specific statutory mandate. One could argue that an even stronger case exists for upholding a new congressionally mandated Fairness Doctrine on such a basis. Congressional findings surely merit more judicial deference than agency ones.

It will be argued, however, that where a statute involves a regulatory policy like the Fairness Doctrine, interference with broadcast content and editorial judgment is implicated. This argument should be considered in the light of another aspect of the fairness problem. The editorial autonomy of broadcast journalism obviously has a claim to first amendment protection but so does the party whose point of view is not allowed expression. The party challenging the broadcaster under the Fairness Doctrine is not the state but the public. The state provides the mechanism for debate. The question of the weight to be accorded congressional findings in a new fairness statute must be approached not as if the constitutional issue presents a contest between the broadcaster and the state; rather, the issue must be viewed as it truly is, a contest in terms between the broadcaster and a member of the public. The issue—and this must always be underscored—is one of first amendment rights in conflict.

The licensee, a public trustee, has first amendment rights but so do members of the licensee's audience. Individual rights in broadcasting precipitated *Red Lion* itself. The public trustee concept and the public interest standard are predicated on the assumption that no one set of participants in the opinion process should always prevail.

In summary, the public trustee-public interest structure of American broadcasting is fatally undermined by the total abolition of any fairness requirement in broadcasting. It cannot be acceptable that the most important public resource, the airwaves—the primary forum for the nation's exchange of ideas—can be wholly privatized. So parochial a view of the first amendment and of broadcasting should not be allowed to prevail.

---

169. 436 U.S. 775 (1978).

170. *Id.* at 798-99.